

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

MORRIS RUCKER v. STATE OF TENNESSEE

Appeal from the Circuit Court for Morgan County
No. 8992 E. Eugene Eblen, Judge

No. E2005-01713-CCA-R3-HC - Filed November 8, 2006

The petitioner, Morris Rucker, appeals from the trial court's order dismissing his petition for writ of habeas corpus. The state has filed a motion requesting that this court affirm the trial court's denial of relief pursuant to Rule 20 of the Rules of the Court of Criminal Appeals. The petition fails to establish a cognizable claim for habeas corpus relief. Accordingly, the state's motion is granted and the judgment of the trial court is affirmed.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed
Pursuant to Rule 20, Rules of the Court of Criminal Appeals

JOSEPH M. TIPTON, P.J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and NORMA MCGEE OGLE, JJ., joined.

Morris Rucker, Mountain City, Tennessee, Pro se.

Paul G. Summers, Attorney General and Reporter; John H. Bledsoe, Assistant Attorney General; for the appellee, State of Tennessee.

MEMORANDUM OPINION

The petitioner, Morris Rucker, was convicted of assault with intent to commit murder in the first degree with bodily injury, robbery accomplished with the use of a deadly weapon and a second count of assault with intent to commit murder in the first degree, but without bodily injury. He received a life sentence for the assault with injury, forty years for the armed robbery and twenty years for the second assault. All sentences are to be served consecutively. The judgment was affirmed on appeal. See State v. Rucker, 712 S.W.2d 482 (Tenn. Crim. App. 1986). In June 2001, the petitioner filed for post-conviction relief. The trial court dismissed the petition as time-barred and this court affirmed the judgment. See Morris Rucker v. State, No. M2001-02020-CCA-R3-PC (Tenn. Crim. App. Sept. 12, 2002).

On September 4, 2003, the petitioner filed a petition for writ of habeas corpus in which he claimed that (1) the first degree murder statute was unconstitutionally applied to him, (2) his right to a fair trial was violated, (3) the jury was improperly instructed, (4) he received ineffective

assistance of counsel, and (5) the indictment was defective. Underlying the petitioner's claims that the first degree murder statute was unconstitutionally applied to him, that his right to a fair trial was violated and that his indictment was defective was the petitioner's argument that neither the statutory aggravating factor that the murder was "heinous, atrocious or cruel," see T.C.A. § 39-13-204(i)(5), nor any other aggravating factor "used to enhance petitioner's homicide offense to that of a first degree murder conviction" was set forth in the indictment or otherwise found by the jury. The petitioner concluded that this alleged omission established a defective indictment and resulted in his being convicted based in part on "uncharged elements" in violation of due process guarantees and the principles announced in Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348 (2000), and its progeny.

The state moved the court to dismiss the petition. First, the state noted that the petitioner had failed to comply with the statutory requirements for seeking habeas corpus relief by failing to attach copies of the challenged judgments to his petition or offering any reason for their absence. The state asserted that the petition was dismissible on this basis alone.¹ See T.C.A. § 29-21-107(b)(2). Substantively addressing the petitioner's claims, with respect to the petitioner's claim that his indictment failed to include the Section 39-13-204(i)(5) aggravating circumstance, the state correctly noted that this and the other factors included in Tennessee Code Annotated Section 39-13-204(i)(1) - 39-13-204(i)(15) are factors which may apply to enhance the sentence upon a conviction for first degree murder from life imprisonment to death. The state argued that this claim was without merit because the petitioner was not sentenced to death and the enhancement factors were therefore inapplicable to his case. Next, the state asserted that the constitutional claims including the denial of the petitioner's right to a fair trial, improper jury instructions, and ineffective assistance of counsel, were not cognizable in a habeas corpus action because, at most, they would render the judgments voidable and not void if proven. Finally, the state argued that the petitioner's claim of a defective indictment based on the failure to include the statutory aggravating factors potentially applicable in capital murder sentencing proceedings did not entitle him to relief. The state argued that even if such aggravating factors were applicable in the petitioner's case, there is no requirement in the law that they be included in the indictment.

The trial court appointed counsel to the petitioner and heard the matter on July 18, 2005. The trial court found that the state's motion to dismiss was well taken and dismissed the petition. The instant pro se appeal followed.

In Tennessee, "[a]ny person imprisoned or restrained of his liberty, under any pretense whatsoever, except [those held under federal authority], may prosecute a writ of habeas corpus to inquire into the cause of such imprisonment and restraint." Church v. State, 987 S.W.2d 855, 857 (Tenn. Crim. App. 1998); Tenn. Code Ann. § 29-21-101. The purpose of a habeas corpus petition is to contest void and not merely voidable judgments. Archer v. State, 851 S.W.2d 157, 163 (Tenn. 1993) (citing State ex rel. Newsom v. Henderson, 221 Tenn. 24, 424 S.W.2d 186, 189 (1968)). A

¹ As the state correctly notes, the petitioner has attached copies of the judgments as exhibits to his appellate brief, but the judgments do not otherwise appear of record.

writ of habeas corpus may be granted only when the petitioner has established lack of jurisdiction for the order of confinement or that he is otherwise entitled to immediate release because of the expiration of his sentence. See Ussery v. Avery, 222 Tenn. 50, 432 S.W.2d 656 (1968); State ex rel. Wade v. Norvell, 1 Tenn. Crim. App. 447, 443 S.W.2d 839 (1969). The burden is on the petitioner to establish that the judgment is void or that the sentence has expired. State ex rel. Kuntz v. Bomar, 214 Tenn. 500, 504, 381 S.W.2d 290, 291-92 (1964).

In the present case, the petitioner has not established that he is entitled to habeas corpus relief. His sentence of life plus sixty years has not expired, and his petition does not show a void judgment, “one in which the judgment is facially invalid because the court did not have the statutory authority to render such judgment.” Dykes v. Compton, 978 S.W.2d 528, 529 (Tenn. 1998). The state correctly contends that the petitioner’s constitutional claims are not cognizable here because, even if proven, they would render the judgments merely voidable and not void. Neither does his claim of a defective indictment support issuance of the writ. We note that, with respect to this claim, the petitioner before this court has apparently abandoned his argument that the Section 39-13-204 statutory aggravating circumstances were improperly omitted from his indictment. Instead, his focus has shifted to the facts relied upon by the trial court to find that the conviction offenses were “especially aggravated” in nature and the resulting imposition of enhanced sentences. See T.C.A. § 40-35-107 (1982). While still relying on Apprendi and its progeny, the petitioner in his brief argues that he was convicted of one offense and essentially sentenced for another in that the facts used to enhance his sentence were not set forth in the indictment or found by a jury. Because this particular argument has been raised on appeal for the first time, it does not merit appellate review. It has long been established that an appellate court will not consider an issue raised for the first time in the appellate court. Lawrence v. Stanford, 655 S.W.2d 927, 929 (Tenn. 1983); State v. Alvarado, 961 S.W.2d 136, 153 (Tenn. Crim. App. 1996). Nor may a defendant litigate an issue in the trial court on one ground, abandon the ground, and assert a new basis or ground for his contention in this court. State v. Matthews, 805 S.W.2d 776, 781 (Tenn. Crim. App. 1990); State v. Aucoin, 756 S.W.2d 705, 715 (Tenn. Crim. App. 1988); State v. Brock, 678 S.W.2d 486, 489-90 (Tenn. Crim. App. 1984). And although this court may, in certain circumstances, address as plain error an issue that would otherwise be waived, we conclude that the application of the plain error doctrine is not appropriate in the instant case. See Rule 13(b), T.R.A.P.

Lastly, the petitioner in his brief asserts that the trial court erred in failing to grant his pro se motion that requested DNA analysis of the blood stains found on a pair of pajamas introduced into evidence at trial. The record reflects that the motion was filed in February 2004, while his habeas corpus petition was pending. The record further reflects that the petitioner’s then appointed counsel of record moved the trial court to accept the pro se request for DNA analysis as adopted by counsel. In his motion, the petitioner asserted that the requested testing would establish his actual innocence of the conviction offenses because “he knows that this blood was not his” The record does not reflect that the motion was ever addressed by the state or disposed of by the trial court. The motion for DNA analysis thus remains pending in the trial court and is not ripe for appellate review. Accordingly, this issue is not disposed of as part of the instant habeas corpus appeal.

Based on the foregoing and upon due consideration of the pleadings, the record, and the applicable law, the court concludes that the petitioner has failed to establish that he is entitled to habeas corpus relief based on his claim of a void judgment. Accordingly, the state's motion is granted. The judgment of the trial court is affirmed in accordance with Rule 20, Rules of the Court of Criminal Appeals.

JOSEPH M. TIPTON, JUDGE